



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

June 16, 2003

Ms. Lydia L. Perry  
Law Offices of Robert E. Luna, P.C.  
4411 North Central Expressway  
Dallas, Texas 75205

OR2003-4136

Dear Ms. Perry:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 182799.

The Lewisville Independent School District (the "District"), which you represent, received two requests for information from a representative of the Dallas Morning News on March 25 and April 8, 2003, respectively. The requestor seeks information concerning a named District employee and the District's policy regarding sexual harassment, sexual assault, and/or other violations of a sexual nature. You inform us that the District will provide the requestor with a redacted version of responsive information. You assert portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we note section 552.022 of the Government Code governs some of the submitted information. Section 552.022 provides as follows:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information contains a completed investigation of sexual harassment allegations. Thus, the District must release the information, unless it is expressly confidential under other law or excepted from disclosure under section 552.108. As you claim mandatory exceptions under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code, we will address your arguments under these provisions.

The District contends that Exhibits B and C are governed by section 552.101 of the Government Code in conjunction with *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the disclosure of the information. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. *Ellen*, 840 S.W.2d 519. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure.

In this instance, we find Exhibit B contains a memorandum dated March 25, 2003 that constitutes an adequate summary of the investigation. Further, we find Exhibit B contains statements of the accused. Therefore, with respect to the submitted information that concerns the March 2003 sexual harassment investigation, we conclude that under *Ellen*, the District must release the summary we have marked and the statements of the accused person in Exhibit B, with redactions of the identifying information of the victim and witnesses. The District must withhold the remainder of the submitted information in Exhibits B and C.

Also, as the application of *Ellen* protects only the identifying information of the victim and witnesses in a sexual harassment investigation, we address your claims under section 552.114 of the Government Code and the Family Educational and Privacy Rights Act ("FERPA"). Section 552.026 of the Act provides as follows: "This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the [FERPA]." Section 552.101 also encompasses information made confidential by other statutes. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114(a). This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution must withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded must withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Nevertheless, you have submitted such information to this office for consideration; therefore, we will consider whether the information not protected by *Ellen* is excepted from disclosure under sections 552.026 and 552.114 of the Government Code.

In this instance, the District maintains documents that directly relate to students. Therefore, this information constitutes education records as defined by FERPA. *See* 20 U.S.C. § 1232g(a)(4)(A). FERPA requires an educational institution to withhold information from required public disclosure only to the extent "reasonable and necessary to avoid personally identifying a particular student or one or both of the student's parents." Open Records Decision Nos. 332 (1982), 206 (1978). Here, we find no evidence that the requestor is the parent or legal guardian of any of these identifiable students. *See* 20 U.S.C. § 1232g(a)(1)(A) (granting parents access to the education records of their children). Moreover, the requestor has not provided the District with written authorization from a parent or legal guardian of any of the students granting him access to the submitted records. *See* 20 U.S.C. § 1232g(b)(1).

Therefore, we have marked student-identifying information that the District must withhold under FERPA.

Next, you assert section 261.201 of the Family Code protects one document in Exhibit D. This provision reads, in pertinent part, as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a)(1), (2). Based on your arguments and a review of the submitted information, we agree the information consists of a report of alleged or suspected abuse made under chapter 261 of the Family Code. Thus, the submitted information is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). Therefore, the District must withhold the document you have marked, in its entirety, from the requestor.

Further, we note federal regulations prohibit the release of criminal history report information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming the District possesses CHRI, it must withhold the CHRI from the requestor.

The District also raises section 21.355 of the Education Code as an exception to required public disclosure. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has

interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word “teacher,” for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* Open Records Decision No. 643 at 4.

The information you submitted contains documentation showing the individual whose evaluations are at issue is a certified teacher under Chapter 21 of the Education Code. Further, we find the submitted information includes evaluations as contemplated by section 21.355. Therefore, we conclude this information is excepted from disclosure in its entirety under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Accordingly, the District must withhold the information you have clipped and labeled “Evaluations[.]”

You argue some of the submitted information is excepted from disclosure under section 6103(a) of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term “return information” includes “tax liability . . . prepared by . . . or collected by the Secretary with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax[.]” *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff’d in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Therefore, we conclude information pertaining to a tax levy constitutes “tax return information” as contemplated by section 6103(a) of title 26 of the United States Code. *See Johnson v. Sawyer*, 120 F.3d 1307, 1330 (5<sup>th</sup> Cir. 1997) (tax return information is confidential unless disclosure is permitted by exception found in section 6103) (citing *Chandler v. United States*, 687 F. Supp. 1515, 1516 n.1 (C.D. Utah 1988), *aff’d*, 887 F.2d 1397 (10<sup>th</sup> Cir. 1989) (notice of levy disclosed tax return information). Thus, the District must withhold the tax levy information in accordance with federal law.<sup>1</sup>

As you note, the submitted information also includes an Employment Eligibility Verification, Form I-9, governed by section 1324a of title 8 of the United States Code. This statute provides that Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Act would be “for purposes other than for enforcement” of the

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<sup>1</sup> As section 6103 of title 26 of the United States Code is dispositive on this issue, we need not address your claim under section 552.102 of the Government Code and common-law privacy.

referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101; and therefore, the District may release this form only in compliance with the federal laws and regulations governing the employment verification system.

Additionally, you claim section 552.117 of the Government Code governs some of the responsive information. Section 552.117(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Gov't Code § 552.117(1). Whether section 552.117 protects information from disclosure depends on when the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the District must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the District received the present request for information. In this instance, you have submitted a memorandum as supporting documentation for the employee's election under section 552.024 of the Government Code. This document records an employee's election regarding release of his name, address, and telephone number. The employee whose information has been requested timely elected to keep his home telephone number confidential; he authorized the District to release his home address. However, the document does not address the employee's election with respect to his social security number or family information. Therefore, the District must withhold only the employee's home telephone number under section 552.117(1) of the Government Code. Further, we note one option states the following: "Do not release any information." Section 552.117 does not permit an individual to withhold his name from required public disclosure. *See* Gov't Code § 552.117(1). Moreover, section 552.022(a)(2) makes a public employee's name expressly public. *See* Gov't Code § 552.022(a)(2).

Regarding the releasability of the employee's social security number, we note this information may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the responsive records is confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 of the Government Code and the referenced federal provision. However, we caution the District that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, you should ensure that no such information was obtained or is maintained by the District pursuant to any provision of law enacted on or after October 1, 1990.

Also, as you note, some of the submitted information falls within the purview of section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a driver's license or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. In this case, the submitted information contains a driver's license number and a copy of a driver's license, which the District must withhold under section 552.130 of the Government Code.

Next, we note the applicability of section 552.136 of the Government Code. This provision states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. In this case, the submitted information contains a bank account number. Therefore, the District must withhold the account number we have marked under section 552.136 of the Government Code.

Last, the submitted information contains an e-mail address subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential. *See* Gov't Code § 552.137. You do not inform us that the member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the District must withhold the e-mail address of the member of the public, which we have marked, under section 552.137 of the Government Code.

In summary, with respect to the March 2003 sexual harassment investigation, the District must release the summary we have marked and the statements of the accused person in Exhibit B, with redactions of the identifying information of the victim and witnesses, under section 552.101 of the Government Code in conjunction with *Ellen*. Under FERPA, the District must withhold the identifying information of any other students from the information the District must release. The District must withhold the following information under section 552.101 in conjunction with the specified provisions: 1) the document you have marked in Exhibit D under section 261.201 of the Family Code, 2) to the extent it exists, any criminal history record information under federal and state statutes, 3) the teacher evaluations under section 21.355 of the Education Code, 4) the tax information under section 6103 of title 26 of the United States Code, and 5) if applicable, the social security number in accordance with the federal Social Security Act. The District may release Form I-9 only in

compliance with applicable federal laws and regulations. Further, the District must withhold the home telephone number under section 552.117 of the Government Code. The District must withhold the copy of the driver's license and driver's license number under section 552.130 of the Government Code. The District must withhold the bank account number, which we have marked, under section 552.136 of the Government Code. The District must withhold the e-mail address we have marked under section 552.137 of the Government Code. The District must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be



sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christen Sorrell".

Christen Sorrell  
Assistant Attorney General  
Open Records Division

CHS/seg

Ref: ID# 182799

Enc: Submitted documents

c: Mr. Kevin Krause  
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